

Remarks

The claims were amended in accordance with the amendments above. The amendments to the claims are being made merely to clarify the invention. All of the amendments are fully supported by the specification, claims, and figures as originally filed. No new matter is believed or intended to be involved.

Claim Objections

Claims 3 and 4 were objected to for depending from canceled claim 2. Claims 3 and 4 have been canceled, thereby obviating the objection.

§103 Rejections

In the Office Action dated May 4, 2007, claims 1, 3-5, 8-12 and 33 were rejected under 35 U.S.C. §103(a) as being obvious over Yencho in view of Huebsch. Under MPEP 2143.03, in order to establish a *prima facie* case of obviousness, the prior art reference or combination of references must teach or suggest all of the limitations of a claim. A *prima facie* case of obviousness also requires that there be some teaching, suggestion, or motivation to modify the references either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. MPEP 2143.01. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. MPEP 2143.01. *Actual evidence* of a suggestion, teaching or motivation to combine prior art references must be shown. *In re Dembiczak*, 50 USPQ2d 1614 (Fed.Cir. 1999). Broad *conclusory statements*, standing alone, simply *are not evidence*. *Id.* Motivation to combine or modify will be lacking if the art teaches away from a claimed combination. MPEP 2145. For at least the reasons set forth below, Applicant respectfully submits that the combined art of record fails to render present claims 1, 3-5, 8-12 and 33 obvious.

Applicant submits that the art of record fails to teach or suggest all of the limitations recited in each independent claim in accordance with MPEP 2143.03. For instance, Applicant notes that independent claim 1 recites “wherein the anastomosis device has a cylindrical shape with a central longitudinal axis extending therethrough with the proximal and distal arms longitudinally aligned therewith when the anastomosis device is in an unactuated position, and

the anastomosis device has a rivet shape wherein the proximal and distal arms each extend radially outward relative to the longitudinal axis when actuated by a longitudinal compressive force to reach an actuated position” and “the proximal arms are radially staggered relative to the distal arms to form a tortuous path of apposed tissue.” These limitations, among others recited in claim 1, are neither taught nor suggested by the combined art of record. Applicant therefore submits that the combined art of record fails to teach or suggest all of the limitations of claim 1 in accordance with MPEP 2143.03. Accordingly, Applicant respectfully submits that the combined art of record fails to render present claim 1 obvious in accordance with MPEP 2143, and respectfully requests that the rejection be withdrawn.

Even if all of the references in combination taught or suggested all of the limitations recited in the amended claims, the Office has failed to establish the motivation to modify or combine the teachings of the references as required by MPEP 2143, and has instead relied upon impermissible hindsight reconstruction in declaring the claimed invention obvious. Indeed, MPEP 2143.01 admonishes that “[t]he mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination.” (emphasis in original). *Actual evidence* of a suggestion, teaching or motivation to combine prior art references must be shown. *In re Dembiczak*, 50 USPQ2d 1614 (Fed.Cir. 1999). Broad *conclusory statements* regarding the teaching of references, standing alone, simply *are not evidence*. *Id.* Rather than being based in evidence in the record, the motivation provided by the Office appears to be based solely on a subjective opinion of an individual examiner rendered nearly 4 years after the priority/filing date of the present application. This falls far short of the requirements of MPEP 2143.01. *See In re Dembiczak*, 50 USPQ2d 1614 (Fed.Cir. 1999). Ultimately, the Office has failed to provide the requisite *evidence* in the prior art suggesting the desirability of the combinations claimed herein. Because the motivation required by MPEP 2143.01 is lacking, Applicant respectfully requests that the rejections be withdrawn.

Applicant further notes that the dependent claims include additional limitations not taught or suggested in the art of record, thus forming independent basis for non-obviousness.

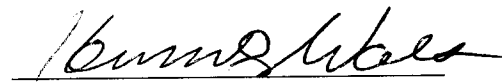
While several distinctions have been noted over the art of record, Applicant notes that there are several other limitations recited in the present claims which are neither taught nor suggested by the art of record. Applicant expressly reserves all rights and arguments with respect to distinctions not explicitly noted herein. In addition, to the extent that the amendments constitute a narrowing of the claims, such narrowing of the claims should not be construed as an admission as to the merits of the prior rejections. Indeed, Applicant traverses the rejections and preserves all rights and arguments. To the extent that any particular statement or argument by the Office in the pending Office Action has not been explicitly addressed herein, the same should not be construed as an acquiescence or admission by the Applicant that such statements or arguments by the Office are accurate or proper.

#### Conclusion

Based on the foregoing, all pending claims are in a condition for allowance. Accordingly, Applicant respectfully requests reconsideration and an early notice of allowance. Should the Examiner wish to discuss the amendments or arguments made herein, Applicant invites the Examiner to contact the undersigned at (513) 651-0026 or via e-mail at [kwales@fbtlaw.com](mailto:kwales@fbtlaw.com).

No fees are believed due. However, the Commissioner for Patents is hereby authorized to charge any deficiency or credit any overpayment of fees to Frost Brown Todd LLC Deposit Account No. 06-2226.

Respectfully Submitted,



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